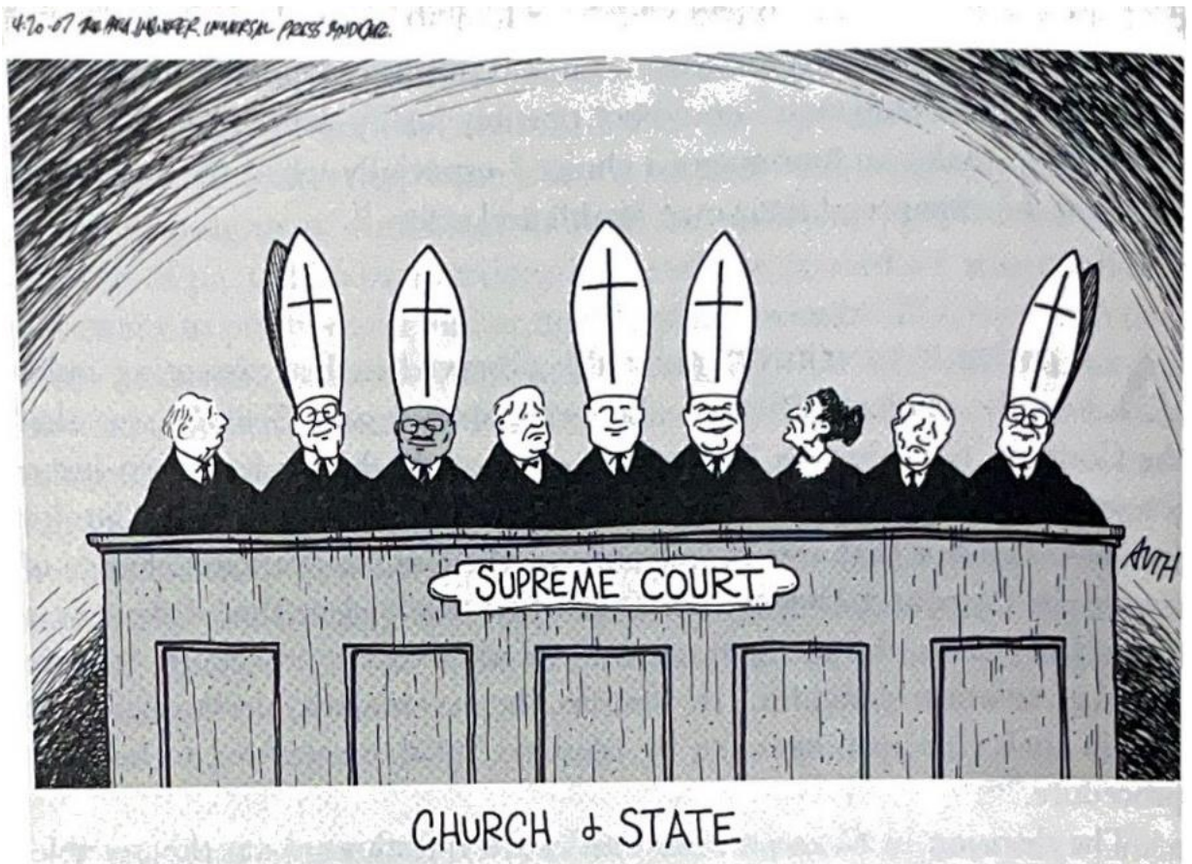

the influence of religion on the justices has now "moved from the theoretical to the concrete." [74]

ABORTION TODAY

EACH YEAR IN the United States, there are approximately 6.7 million pregnancies. Of these, roughly 50 percent, or 3.4 million, are unintended. More than half of all women experience an unintended pregnancy at least once during their lives. Forty percent of all unintended pregnancies end in abortion. Thirty percent of all women have at least one abortion. One million abortions are performed in the United States each year.

Married women have 55 percent of all abortions. They end 7 percent of

*Shortly after the decision in Gonzales, I published an op-ed in the Chicago Tribune to similar effect. See Geoffrey R. Stone, Our Faith Based Justices, Chicago Tribune (Apr. 30, 2007). This led to a bit of a flap between justice Scalia, my former colleague at the University of Chicago Law School, and me. See Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antoino Scalia 204 (Farrar, Straus and Giroux 2009). Happily, Justice Scalia and I later resolved our differences.

*Fifty percent of women who have an abortion have two or more abortion s during their lives.

their pregnancies with an abortion: Unmarried women end 35 percent of their pregnancies with an abortion. They are therefore five times as likely as married women to terminate a pregnancy with an abortion. Teenage girls have almost one fifth of all abortions in America today.

Not surprisingly, income inequality plays a large role in these data. Women living below the poverty line (defined as roughly $24,000 for a family of four) are five times more likely to have an unintended pregnancy than higher income women (women with incomes of $48,000 or more for a family of four). Faced with an unintended pregnancy, higher income women are three times more likely to have an abortion than women living below the poverty line, whereas women living below the poverty line are six times more likely to give birth to an unintended child.

Put differently, if we compare 1,000 women living under the poverty line with 1,000 higher income women, in an average year 122 poor women will have an unintended pregnancy, compared to only 29 higher income women; 52 poor women will have an abortion, compared to 17 higher income women; and 70 poor women will have an unintended child compared to 12 higher income women. Fifteen percent of women live at or below the poverty line, but they have 40 percent of all abortions and 50 percent of all unintended children.75

THE· ANNUAL abortion rate has declined significantly over the past thirty-five years, from 29 per 1,000 women of childbearing age in 1981 to 17 per 1,000 women of childbearing age in 2016. Similarly, the number of abortions performed annually has declined from a high of i6 million in 1990 to approximately I million in 2016. This decline is due primarily to two factors. First, women both married and unmarried are less likely to get pregnant. There was an 11 percent decline in the pregnancy rate from 1990 to 2016. Second, women who get pregnant are less likely to have an abortion. In 1990, married women had abortions in 8 percent of their pregnancies; in 2016 they had abortions in 5 percent of their pregnancies. In 1990, unmarried women had abortions in 47 percent of their pregnancies; in 2016 they had abortions in 31 percent of their pregnancies.

The shift is especially dramatic among teenagers. The rate of pregnancy among teenage girls declined 44 percent from 1990 to 2016, from

All of the data concerning the percentage of pregnancies that end in abortion refer to pregnancies that do not end in miscarriage.

117 pregnancies per 1,000 girls in 1990 to 65 pregnancies per l,000 in 2016. The annual abortion rate among teenage girls declined 60 percent in this era, from 40 abortions per 1,000 in 1990 to 16 abortions per 1,000 in 2016. This was due both to a reduction in the pregnancy rate among teenage girls and a reduction i n the abortion rate among teenage girls when pregnant. Among teenage girls who got pregnant, 35 percent had abortions in 1990, compared to 25 percent in 2016. As a result, teenage girls who got pregnant (almost all unmarried) were 29 percent more likely to give birth to an unintended child in 2016 than in 1990.76

THESE DATA suggest that at least three important factors are at work. First, because the pregnancy rate has declined, it is reasonable to infer that the combination of better sex education, easier access to contraception and the availability of more effective contraception has reduced both the number of unintended pregnancies and, as a result, the number and rate of abortions. This is hardly surprising, because there is a strong correlation between the failure to use contraception and the likelihood of an unintended pregnancy. The 65 percent of women who use contraception consistently and correctly account for only 5 percent of all unintended pregnancies. The 35 percent of women who use contraception inconsistently or not at all account for 95 percent of all unintended pregnancies. Those who correctly use the contraceptive implant, IUD, oral contraceptive pills, the hormonal patch, or the vaginal ring have less than a 1 percent chance of experiencing an unintended pregnancy over the course of a year. Those who use the male condom correctly have a 2 percent chance of experiencing an unintended pregnancy over the course of a year. Those who do not use any method of contraception have an 85 percent chance of experiencing an unintended pregnancy over the course of a year.

For those who want to reduce the number of abortions, easy access to effective contraception and guidance in the use of contraception is critical. Indeed, if all people used contraception consistently and correctly, the number of abortions per year in the United States would drop from one million to approximately 75,000.*

* If all people used contraception consistently and correctly, the total number of unintentional pregnancies annually would be reduced from 3.4 million to approximately 250,000. Because 30 percent of unintended pregnanci.es result in abortion, this would reduce the number of abortions annually from one million to approximately 75,000.

SECOND, BETWEEN 1992 and 2016, it became increasingly difficult for many women who experienced an unintended pregnancy to obtain a legal abortion. This was so in part because the Supreme Court 10 *Casey* and subsequent decisions opened the door to greater regulation of abortion, and th.is resu1ted. m a broad range of new restrictions that significantly constricted the ability of women to exercise their constitutional right to terminate an unwanted pregnancy. The nature and extent of these regulations varies considerably from state to state. The states that have been the most aggressive in restricting abortion since *Casey* are Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Kentucky, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, Texas, and Utah. Not surprisingly, these are all among the most religious states in the nation.

Here are some examples of these restrictions as of 20I6:

> Eleven states prohibit coverage of medically necessary abortions even in private medical insurance plans, unless the woman's life is in danger or the pregnancy was the result of rape or incest;
>
> Thirty-five states require a woman to submit to "counseling" before she may elect to have an abortion;
>
> Twenty-eight states require a woman to wait a period of time, usually twenty-four hours, between her "counseling" and when the procedure may be performed;
>
> Thirteen states effectively require a woman to make two separate trips to the clinic or hospital before she may have an abortion;
>
> Twenty-two states require facilities that perform early term abortions to meet the requirements for ambulatory surgical centers;
>
> Eleven states require abortion facilities that perform early term abortions to be located within a short distance of a hospital;
>
> Sixteen states have burdensome regulations governing the size of procedure rooms and the width of corridors in facilities that perform abortions.

Thirteen states require abortion providers to have an affiliation with a local hospital (many of which are unwilling to with any doctor or clinic that performs abortions).

According to the Guttmacher Institute, between the years 2000 and 2016 the number of states with substantial and " unnecessary abortion restrictions (that is, restrictions that are intended to make abortion difficult rather than genuinely to protect either the health of the woman or fetal life post viability) nearly doubled, from thirteen to twenties Largely as a result of these restrictions, by 2016, 89 percent of all counties. in the United States did not have a hospital that could perform a legal abortion. As a consequence, women living in these counties often have to travel substantial distances in order to exercise their constitutional right to terminate an unwanted pregnancy, often at considerable cost. Not surprisingly, these restrictions have a particularly severe impact on poor women.77

A THIRD explanation for the decline in abortion rates might be that people have become less accepting of abortion. In light of the Christian Right's campaign to characterize abortion as murder and to condemn and shame those who "kill" their "unborn children," it would be surprising if public attitudes about abortion had not grown more negative over the years. As Carole Joffe, a historian of abortion, has observed, although the effects of these efforts are difficult to measure, the antiabortion movement has been "successful at stigmatizing abortion," and this would seem logically to have influenced the downward trend in the rate of abortions.78

In fact, however, the evidence is ambiguous. On some measures, the public's attitude toward abortion has remained strikingly constant. In 1975, 22 percent of Americans thought abortion should be illegal in all circumstances; 19 percent think that today. In 1989, 31 percent of Americans wanted the Supren1e Court to overturn Roe; 29 percent of Americans want that today. On the question of whether the Court's decision in Roe has been good for the nation, 53 percent of Americans say "yes," and only 30 percent say "no." And on the question whether abortion should be legal in "most or all cases," 58 percent of Americans say "yes" and only a third believe that abortion laws should be stricter than they are now.

On balance, then, it does not appear that there has been a significant shift in Americans' acceptance of abortion in the years since Roe. The decline in the rate of abortion therefore seems due more to other changes in soci-

-ety, such as greater access to better methods of contraception and the sharp restrictions some states have enacted in an effort to make abortion less available, than to any dramatic change in public opinion about abortion itself. *[79]

POVERTY IS a central factor in the incidence of abortion in America. Although seventeen states cover medically necessary abortions for poor women, the remaining thirty-three states, the District of Columbia, and the federal government make such funds available only if the abortion is necessary to save the woman's life or the pregnancy was caused by rape or incest. In all other circumstances, indigent women are left to their own devices in dealing with the consequences of unwanted pregnancies.

For many poor women, the challenge of raising the funds necessary to pay for an abortion is simply insurmountable. Although women living at or below the poverty line have 42 percent of all abortions (even though they represent only 15 percent of the population), a quarter of poor women who *want* to terminate unintended pregnancies are unable to raise the funds necessary to do so and therefore give birth to unplanned and often unwanted children. The consequences for such women, and for their families, are often severe.

As demonstrated by the significant decline in the abortion rate among higher income women in recent decades, a critically important response to the dilemma of poor women would be greater access to effective methods of contraception. Indeed, if poor women used contraception in the same manner and to the same degree as other women in society, they would have approximately 600,000 fewer unintended pregnancies and 300,000 fewer abortions each year. But many religious and other morality based groups oppose programs designed to promote sex education and contraceptive use among the poor, either because they deem contraception immoral or because they fear that greater access to contraception will lead to greater promiscuity. The cost of those beliefs is literally *hundreds of thousands* of otherwise avoidable abortions each year.[80]

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* As noted, though, the evidence is ambiguous. One poll, for example, suggests that the percentage of Americans who view themselves as prolife has increased from 37 percent in 1996 to 46 percent today.